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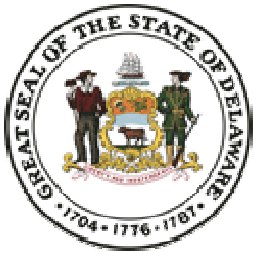

COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

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IN THIS ISSUE:

Page

DELAWARE SUPREME COURT CASES
APRIL 1, 2011 THROUGH June 30, 2011

WORLEY V. STATE, (4/12/11): RESENTENCING ON VOP

D pleaded guilty to Assault 2nd and Assault 3rd. On the Assault 2nd he was sentenced to 6 years at Level V, suspended after 1 year for 3 years of Level IV, suspended after 6 months for 2 years at Level III probation. For the Assault 3rd he was sentenced to 6 months at Level V, suspended after 1 month for 5 months of Level III probation, concurrent with Level III probation of the first sentence. Subsequently, D committed a VOP with respect to both convictions. He was discharged as unimproved as to the VOP for the Assault 3rd. For the Assault 2nd, the court resentenced D to 6 years at Level V, suspended after 1 year for 6 months at Level IV, with no probation to follow; re-imposing his original Level V sentence. D had already served a year of Level V time on his original sentence.

On appeal D claimed that the VOP sentence did not take into account his 1 year served at Level V. The Court concluded that when D violates probation, the trial court may re-impose any previously suspended Level V term, but D is entitled to credit for Level V time he previously served. Although the form of D's sentence may not ultimately result in D serving more Level V time than he was given in his original sentence, in the interest of clarity, the case was remanded in order to modify the VOP sentencing order to include credit for all Level V time D had served. REMANDED.

HUBBARD V. STATE, (4/12/11): *MIRANDA* WAIVER

D and Co-D approached V1 and V2. Co-D ordered V1to get off of his motorcycle while D pointed a gun at both Vs. Co-D drove away on the motorcycle, while D shot at the Vs. V2 escaped unscathed; but V1 suffered gun shot wounds to his jaw, thigh and calf. D was charged with: Attempted Murder 1st; Carjacking 1st; Conspiracy 2nd; Reckless Endangering 1st; PDWBPP; two counts of Robbery 1st; and five counts of PFDCF. D was found guilty of all charges and sentenced to twelve life terms without the possibility of any reduction.

On appeal, D argued that the trial court erroneously denied his motion to suppress his statement to police because his waiver of his *Miranda* rights was not knowing, intelligent, or voluntary. D argued that the detective was too hasty in his recitation of the *Miranda* rights; the detective did not affirmatively ascertain the waiver of D's rights; and the detective failed to ascertain if D was competent to waive his rights because he had

been intoxicated the night before. The Court rejected D's arguments and held: that there is no time requirement necessary for recitation of *Miranda* rights; the record reflects that the detective did ascertain that D understood his rights; and lastly, prior intoxication does not *per se* invalidate a *Miranda* waiver. AFFIRMED.

WHITAKER V. STATE, (4/12/11): MODIFICATION OF PARTIAL CONFINEMENT

In April 2008, D pled guilty to Attempted Robbery 1st and PFDCF and was sentenced to a total period of eleven years at Level V, suspended after six years for six months at Level IV home confinement followed by one year at Level III. In January 2011, D filed a motion for modification of the terms of his partial confinement. He sought to convert the Level IV home confinement portion of his sentence to Level IV Crest Program. The trial court denied the motion on the grounds that it was untimely and because his sentence was appropriate.

On appeal, D argued that the trial court erred in denying his motion as untimely because a motion for modification of the terms of partial confinement or probation may be filed "at any time." The State conceded that this was correct under Del.Super.Ct.Crim.Rule 35 (b). However, there was no transcript of D's sentencing hearing so there was no basis upon which the Court could review the appropriateness of the sentence. Therefore, the matter was remanded for further hearings on the merits of the motion. REMANDED.

MORRISON V. STATE, (4/25/11): STATE'S DUTY TO PRESERVE EVIDENCE; CROSS EXAMINATION

D asked V for money on the street then followed V to her apartment. D asked for water. V had him wait outside, shut the door then went to the kitchen to get some water. When she turned around D was in the house. D grabbed her and 'scared her to death.' V screamed then D left. Later, V identified D for police. After a trial, D was convicted of Burglary 2nd; Unlawful Imprisonment 2nd; and Offensive Touching. D appealed, claiming that he was denied a fair trial because: a) V's testimony was different from her statement to police; b) the prosecutor failed to ask V if her testimony was truthful; and c) the police failed to investigate the case properly and preserve exculpatory evidence.

On appeal, the Court held that any inconsistencies between V's statement to police and her testimony at trial are subject to cross-examination by the defense. It is up to the jury to determine credibility and resolve any conflicting statements. D did not

cross-examine V at trial and the transcript did not reflect any reason that prevented him from doing so. With regard to D's second claim, the prosecutor is not obligated to inquire about the truth of V's statement. Again, it is the defense's job to cross-examine the witness and bring any inconsistencies to the attention of the jury. Lastly, a failure by police to preserve evidence is subject to a three part analysis: 1) the degree of negligence or bad faith; 2) the importance of the missing evidence; and 3) the sufficiency of other evidence to sustain the conviction. In this case, D claimed to have been in the V's bathroom, but was unable to describe it to police. Thus, there is no basis for a claim that police acted negligently or in bad faith for failing to collect evidence from the bathroom. AFFIRMED

LEFEBVRE V. STATE, (4/26/2011): PROBABLE CAUSE/ DUI ARREST

P1, in an unmarked car, saw D in lane next to him while they were each at a stop light. There was yelling and bouncing around in D's car. When light changed, D pulled up within a foot of another car. There was no swerving and P1 could not tell if D was speeding. After D turned without a signal, P1 stopped her. P1 claimed that D had slurred speech and that she smelled a strong odor of alcohol. However, P1's video revealed that she was understandable. P1 requested that a patrol unit respond to conduct field sobriety tests. P2 responded and also claimed there was slurred speech and a strong odor of alcohol. P2 conducted several field sobriety tests. D passed all of them except the horizontal gaze nystagmus test and the portable breath test. P2 noted that D "did well on her tests" but P1 said, "she's drunk." P2 arrested D for DUI.

D filed a motion to suppress the results of an intoxilyzer test administered to determine her breath alcohol concentration, arguing that there was no probable cause to arrest her for a DUI offense. D claimed that her success on the field sobriety tests negated the probable cause for arrest that existed before the field tests were administered. D's motion was denied and she was found guilty of DUI.

On appeal, the Court concluded that the successful results of field sobriety tests may eliminate suspicion and unsuccessful results can elevate suspicion into probable cause. However, successful results are of insufficient evidentiary weight to eliminate probable cause that had already been established by the totality of the circumstances before the performance of the field sobriety tests. Here, D conceded that prior to the administration of the field sobriety tests, P2 had probable cause to make an arrest. Therefore, D's ability to pass the field tests did not negate the probable cause to arrest that already existed. AFFIRMED.

DISSENT: D's " 'concession' is not a fact, and it should have no bearing on the probable cause determination. Moreover, by compartmentalizing the probable cause analysis, the majority uses a test that does not properly consider the "totality of the circumstances."

PIERCE V. STATE, (4/29/11): TRAFFIC STOP; PRETEXT

P saw a car make a right-hand turn without signaling. P stopped the car and asked D, the driver, for his license, registration and proof of insurance. D and his passenger both looked nervous, were stuttering and looking down at the floor. D gave inconsistent answers about where he was coming from and where he was headed. P asked whether there was any contraband in the car, D denied that there was and invited P to search the car. As D and his passenger exited the car, P saw D hide something under the floor mat. P then found a pipe and several crack rocks under the mat.

D moved to suppress the evidence on two grounds: (1) that the traffic stop was pretextual; and (2) the subsequent questions constituted a second investigative detention unsupported by reasonable suspicion. D argued that any consent was tainted by the illegal detention. The trial court denied the motion because P stopped D for a legitimate traffic violation and the questions were routine. On appeal, the Court found that since D did not dispute the validity of the stop, P was statutorily authorized to question him about his "name, address, business abroad, and destination" and that whether there is contraband in the car is a routine question during a traffic stop. Therefore, the stop and subsequent questions did not constitute a pretext for drug investigation or a second investigative detention. AFFIRMED

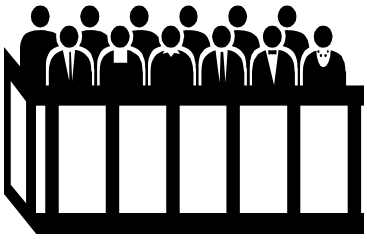
PHILPOT V. STATE, (5/3/11): SEVERANCE OF CHARGES

D, 32 years old, met V, seventeen years old, while working as a volunteer basketball coach at her school. In January 2009, V ran away from home and stayed at a friend's house for a week, during which time she and D had sexual intercourse several times. To help her run away D drove victim to a train station, she was later found on a train in West Virginia. Upon V's return to DE she was interviewed about her relationship w/ D, but denied having sex. D pled guilty to Endangering the Welfare of a Child. V eventually admitted to having sex w/ D, at which point D was arrested and charged w/ four counts of Rape 4th. In violation of a court order, D continued seeing, calling and emailing V in an attempt to convince her and her family not to testify. The State

reindicted D and added six counts of Tampering w/ a Witness, 27 counts of Criminal Contempt, and one count of Falsely Reporting an Incident.

D filed a motion to sever the non-rape charges. The trial court denied the motion on the grounds that the separate offenses were logically relevant to each other and that they would have been admissible at the separate trials as corroboration of the original offenses and evidence of intent. After trial, D was found guilty on all but two of the rape charges. D appealed the denial of his motion arguing that the non rape charges should have been severed b/c they are not similar to the rape charges, they took place afterwards and they had no logical connection to the rape charges. The Court found that, by their very nature, the tampering charges related directly to the relationship which created the rape charges. The trial court did not abuse its discretion because there was no substantial prejudiced created by the joinder of the charges. AFFIRMED

LEWIS V. STATE, (5/12/11): SENDING 3507 STATEMENTS TO THE JURY



P responded to a house based on a call of "shots fired." They found V had been shot in the back of the head. At trial, the State called V and a few other witnesses to identify D. Each of them had identified D in pretrial statements as the shooter. However, they each recanted in court. Thus, the State played their out of court statements pursuant to 3507. The jury complained about the inability to hear one of the tapes. The parties agreed that the tapes should be entered as Court Exhibits only and not be sent to the jury. However, the trial court stated that the *Flonnory* rule regarding sending 3507 statements to the jury was not absolute and that because the jury could not understand one of the statements in this case, an exception was warranted. So, it sent all the tapes back with the jury.

On appeal, the Court found that the trial court erred as neither of the exceptional circumstances in *Flonnory* existed. Here, the parties agreed that the exhibits should not go back to the jury. Neither did the jury ask to listen again to the troubled statement. Finally, sending all of the statements back to the jury created the danger of overemphasis that the *Flonnory* Court was concerned about. REVERSED.

ROMEO V. STATE, (5/13/11): STATE'S USE OF PERJURED TESTIMONY

V died from gunshot wounds to the arm and chest. After an investigation, D was indicted for Murder 1st, PFDCF, and PDWBPP. At trial the jury was deadlocked on the counts of PFDCF and Murder 1st, so a retrial was granted. At the new trial a detective testified that W identified D as a man she saw holding a beer bottle. However, W's 3507 statement revealed that she did not identify D. D cross examined the detective on this and he acknowledged that he had been incorrect. The jury found D guilty of M1 and PFDCF while the judge found him guilty of PDWBPP. He was sentenced to life plus twenty-eight years in prison.

On appeal, D argued that his convictions should be reversed because a detective committed perjury at trial. The Court acknowledged that a "person is guilty of perjury when he 'swears falsely'" and a "person 'swears falsely' when the person *intentionally* makes a false statement or affirms the truth of a false statement previously made, knowing it to be false or not believing it to be true, while giving testimony.'" However, mere contradictions in testimony establish a credibility question for the jury; and are not necessarily evidence of perjury. Here, D did not show that the detective intentionally made, or the State knowingly used, a false statement. The detective's response on direct examination was inaccurate; however, on cross-examination D was able to elicit the correct answer from him.. The State used other evidence apart from his testimony as well. Therefore, the there was no plain error. AFFIRMED

BARBOUR V. STATE, (5/13/11): PDWDCF SENTENCE

D admitted to accidentally shooting V and was charged by indictment with manslaughter, PDWBPP, PDWDCF, receiving a stolen firearm, and three counts of endangering the welfare of a child. As to the count of PDWDCF, the indictment cited to 11 *Del.C.* § 1447. D pled guilty to manslaughter, PDWBPP, and PDWDCF. At sentencing the judge stated that he was imposing the mandatory sentence of 5 years at Level V for the PDWDCF count. He then cited to title 11 *Del.C.* § 1447A which addresses PFDCF not PDWDCF.

On appeal D argued that "the Superior Court erred as a matter of law in [s]entencing him not under the two year minimum, mandatory sentence set forth under [11 *Del.C.* § 1447], but the five year minimum, mandatory sentence for third felonies under [11 *Del.C.* § 1447A]." The Court held that D must be sentenced pursuant to the

statutory provision that the indictment charged and to which he pled guilty – section 1447 – and not section 1447A. VACATED and REMANDED.

TAYE V. STATE, (5/17/2011): FIREFIGHTER/EMERGENCY MEDICAL RESPONDER

V was an Emergency Medical Responder and Firefighter. She responded to the scene of a motorcycle accident and attended to an injured motorist. D drove past the scene, hit a police car, V and the injured motorist. V died. D was charged with Murder First Degree rather than manslaughter because V was a firefighter. Under 11 *Del. C*. § 636(a)(4) "a person is guilty of first degree murder, as opposed to manslaughter, when the person recklessly causes the death of a law enforcement officer, corrections employee or firefighter while such officer is in the lawful performance of duties." The Code does not define "firefighter." D moved for a judgment of acquittal because the ordinary definition of "firefighter" is a person who puts out fires, and V was not fighting a fire at the time of her death. The trial court denied the motion.

On appeal, the Court noted that at the time D's car struck and killed her, V had been dispatched by the Wilmington Manor Fire Company to assist an injured motorist. Evidence proved that V was a trained and qualified firefighter and that firefighters had many roles under the firefighter classification in Delaware City. The Court decided, viewing the evidence in the light most favorable to the State, that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt that V was a firefighter in the lawful performance of her duties. AFFIRMED.

JACKSON V. STATE, (5/23/2011): DISPARAGING COMMENTS ABOUT DEFENDANT BY HIS ATTORNEY

D was indicted for Murder 1st, Burglary 2nd, Robbery 1st, three counts of PDWDCF, Conspiracy 2nd and felony murder. Pretrial, D's attorney filed a Motion to Withdraw as Counsel, citing the financial burden on D's family of his continued representation. During a sidebar, the attorney gave an additional, unwritten reason for his motion. He expressed revulsion with D, belief in his guilt, and belief that D should die. The record of this sidebar was sealed and the motion was granted. The Judge presided over the rest of the case. D received a death sentence. On appeal, D's convictions were affirmed but the death sentence vacated on grounds unrelated to the attorney's withdrawal. He then engaged in post conviction proceedings. The same judge presided over the first post conviction motion proceedings as presided over the trial and

sentencing. It was during post conviction proceedings that the attorney's comments were uncovered.

On appeal from his second motion for pos conviction relief, D argued that: 1) an unlawful "appearance of impropriety" tainted the entire judicial proceeding and entitled him to relief under *Stevenson;* 2) his death sentence violated his due process rights under *Gardner*, and 3) his attorney violated his Sixth Amendment right to counsel. With regard to the first claim, the Court found that D's case was materially different from *Stevenson*. In *Stevenson,* the judge affirmatively sought to try the capital case. However, in this case, the comments by the attorney were thrust upon him so there was no appearance of impropriety. As for the second claim, this case is unlike *Gardner* in that there was no evidence that the judge relied on the attorney's statements and the second sentencing hearing suggests that the Judge did not rely on the sidebar comments; the Judge found one less aggravating factor, than in the first hearing. Finally, D was unable to establish that his attorney was deficient or that his performance prejudiced D because the attorney was allowed to withdraw and there was no evidence that the judge relied on his comments in sentencing. AFFIRMED.

ANDERSON V. STATE, (5/24/2011): PROSECUTORIAL DISCRETION/ HABITUAL DRIVING OFFENDER

The State filed a habitual driving offender petition against D. Initially the judge entered judgment against D, but hours later vacated her judgment on the basis that the State's exercise of prosecutorial discretion in D's case was inconsistent with its prosecution of other habitual driving offender petitions heard that same day. Several of the other drivers had been offered a six month continuance so they could redeem themselves which would prompt the State to withdraw the petition, while D had not. And, the judge believed the prosecutor had misrepresented information to her. The State appealed to the Superior Court and the vacated sentence was revived.

The Supreme Court then affirmed the Superior Court's decision. The Court found that the judge vacating her first decision was not justified. The judiciary is required to give deference to the State's exercise of charging discretion, unless that exercise violates equal protection or due process principles, which was not the case here. The State's exercise of prosecutorial discretion in filing a habitual driving offender petition against D was both legally and factually proper, and its refusal to offer a continuance did not constitute a legal wrong. If the trial court had believed that D was wronged when she was not offered a continuance, it could have remedied that wrong by

making its own offer to continue the case, but such was not done. Instead, by vacating its earlier judgment it effectively dismissed the State's petition against D. Such remedy bore no logical relationship to the supposed procedural wrong the court sought to redress. AFFIRMED

DOUGHERTY V. STATE, (6/9/2011): CONSPIRACY; SPECIFIC UNANIMITY JURY INSTRUCTION

D was charged with conspiracy second degree based on his involvement with Co-D in a burglary. In the indictment, the State alleged alternative overt acts: engaging in conduct constituting burglary second degree, an attempt to commit that crime, or "some other overt act" in pursuance of the conspiracy. D never requested an instruction requiring the jury to determine unanimously which particular overt act was committed.

On appeal, D argued that the trial judge committed plain error by not, *sua sponte*, giving a specific instruction requiring the jury to determine unanimously which particular overt act was committed. The Court reviewed D's claim for plain error. Because the authorities in other jurisdictions were split on the issue, the Court could not conclude that the trial judge committed plain error in this case. In fact, several jurisdictions have also concluded that this is not plain error. AFFIRMED.

TANN V. STATE, (6/13/2011): SCOPE OF TRAFFIC STOP; RELIABILITY OF CONFIDENTIAL INFORMANT

P observed a Mercury Marquis. They had a tip that drugs were being sold out of a car matching that description. When P noticed that the driver was not wearing his seatbelt they conducted a traffic stop. D provided his license and registration upon request. After a suppression hearing, the trial court found that D's subsequent arrest was not the result of a detention that went beyond the scope of the traffic stop because: 1) D was nervous and his hands were shaking uncontrollably; 2) there was a box of plastic bags on the back seat of the car, and that type of bag is used in packaging drugs; 3) passenger 2 said that he had $700 in cash, an amount that suggests drug dealing; 4) a computer check of D's ID revealed he had a prior weapons arrest; 5) a computer check of passenger 2's ID revealed an outstanding warrant; and 6) D reached underneath his seat immediately before getting out of the car, which suggested that there were drugs or a weapon stashed under the seat.

The trial court also concluded that D's argument that the C.I. was not reliable lacked merit because the arrest was based on the totality of the circumstances viewed in light of the officer's training and experience. The tip, along with the above-mentioned factors led to probable cause. Lastly, D argued that, as in *Gant v. Arizona*, P wrongfully conducted a warrantless search of his car, because it was conducted after he was out of the car and had no access to it. The trial court concluded that here, P had reason to believe, based on the factors above, that there was evidence in the car related to the crimes. Therefore, the trial court's decision was not an abuse of discretion. AFFIRMED.

WYNN V. STATE, (6/27/11); SENTAC BENCHBOOK GUIDELINES

V and friends were sitting on front porch drinking during a party. D and a friend approached and asked if they could drink with them. They were told no, and words were exchanged. D or his friend said "we'll be back." They returned and engaged in another argument with V & co. D fired three shots from a handgun which injured two V's. Later, D pled guilty to two counts of Assault 2nd, two counts of PFDCF, and one count of Reckless Endangering 1st. D was informed that court did not have to follow State or PSI recommendations. At sentencing, the Judge determined that two aggravating circumstances (intent to injure or kill and firing a gun into a helpless, unarmed group) justified departure from the SENTAC Benchbook guidelines. So, he sentenced D to thirty-one years at Level V, suspended after twenty-four years for probation. This was 4 times the minimum mandatory time and three times the State's recommended penalty. However, it was within the maximum statutory penalty.

On appeal, D claimed that the judge misunderstood and misapplied the SENTAC Benchbook guidelines when he sentenced D. He argued that the judge: 1) failed to consider mitigating evidence and V's own involvement; 2) made incorrect factual conclusions about his criminal history, educational, and vocational background; and 3) erroneously enhanced the sentence on the two PFDCF charges. The Court concluded that the judge was not required to consider any mitigating evidence as it was contradicted by the evidence. Additionally, the trial court found D was not credible and that his apology was insincere. The record does not reflect that the judge relied on incorrect criminal charge or that he misinterpreted D's educational or vocational background. Finally, the SENTAC guidelines are not binding on the judge. He has discretion to impose a more severe penalty if the circumstances so justify. AFFIRMED.

WATKINS V. STATE, (6/28/11): EVIDENCE RELEVENT TO MISIDENTIFICATION

V went to ATM at a bank. She saw a man holding a gun and approaching her. The man grabbed V and told her to withdraw $500 from the ATM. V complied. The man got the cash and fled. P distributed an "attempt to identify flyer" which contained photographs of the perpetrator obtained from the bank. Two officers identified D as the perpetrator. D was charged with and subsequently convicted of Robbery First Degree and PFDCF.

On appeal, D contended that the judge had abused his discretion at trial when he precluded his "proffer of exculpatory evidence to establish a reasonable doubt that someone else may have committed the crime for which [he] was charged." Defense counsel had attempted to call W, who had been convicted of robbery of the bank across the street from the one at issue in our case, to show, in essence, that D had been wrongfully identified as the perpetrator of this crime. The judge, however, did not allow W to testify because the other robbery was too attenuated to link him to this robbery.

The Court found that the evidence was probative and relevant; because D's sole defense was that of misidentification and W's testimony would help bolster that defense. The evidence was probative because: the banks were located across the street from one another; the perpetrators fled into the same area; and the perpetrators were both white males and had similar builds. Any potential of prejudice of the possibility that W would invoke his 5th Amendment rights did not substantially outweigh this probative value. REVERSED.